SOCIETIES, TRUSTS / CHARITABLE INSTITUTIONS, WAQFS AND ENDOWMENTS

3

3.1 Legal and Institutional Framework

3.1.1 Legal Context

3.1.1.1 The law concerning Societies, Trusts, Waqfs and other endowments in India can be placed in three broad groupings:

(i) Societies registered under the Societies Registration Act, 1860 and various States amendments on it after 1947;

(ii) Those engaged in pure religious and charitable work registered under the Religious Endowments Act, 1863; the Charitable and Religious Trusts Act, 1920; the Waqf Act, 1995 and similar other State Acts;

(iii) Trusts and charitable institutions registered under the Indian Trusts Act, 1882; Charitable Endowments Act, 1890; the Bombay Public Trusts Act, 1950; and similar other State Acts.

The main features of these enactments are indicated in the Table at Annexure III (1).

3.1.1.2 In addition to meeting the requirements of legislation as listed in the Table at Annexure III (1), charitable organisations are also required to follow the provisions of law as applicable to their functional areas. For example, those working in the health sector need to follow the laws applicable to that sector. Similarly, organisations working on environment protection will have to abide by the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Forest (Conservation) Act, 1980 etc.

3.1.1.3 Societies

3.1.1.3.1 Modelled on the English Literary and Scientific Institutions Act, 1854, the Societies Registration Act was enacted in India in 1860. Towards the middle of the 19th century coinciding with the 1857 event, a number of organisations and groups were established

in the country on contemporary issues of politics, literature, arts and science. The above law was enacted partly to give such organisations a legal standing and partly, to enable the colonial government to maintain a watch on them. But, the Act was not intrusive at all and it gave full freedom to the Societies/organisations which chose to register with the government.

Purpose for formation of Societies under the Societies Registration Act, 1860 :

It provides for formation of a Society for any literary, scientific, or charitable purpose, or for any such purpose as is described under Section 20 of the Act. In terms of Section 20, the following Societies may be registered under this Act:

> *"Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge, *[the diffusion of political education], the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs."*

3.1.1.3.2 Many States created separate authorities for registering and supervising such Societies. According to the Act, any seven persons who subscribe to a Memorandum of Association (MOA) can register a Society. The Memorandum should include the names of the Society, its objectives, the names, addresses and occupations of members subscribing to it as well as the first Governing Body to be constituted on registration. The MOA should be accompanied by a set of Rules and Regulations – this should include details such as the procedure for enrolment and removal of members, procedure for formation of the Governing Body, conduct of meetings, election and removal of office bearers, procedure for conducting annual General Body meetings, etc. The membership of the Society may be kept open (or by invitation) to anybody who subscribes to its aims and objectives, for which a fee may be charged. Although the Society can sue and can be sued, the liability of the members is limited, as no decree can be enforced against the members' private assets. The Society has a perpetual existence and a common seal, and can sue or be sued in the name of the office bearer as prescribed under its rules. This enables its effective participation in public life.

3.1.1.3.3 A strong tenor of democracy runs through the entire Act. Alteration, extension, or abridgement of purpose of the association or any decision on amalgamation can be effected only when any such proposition is approved by three-fifth of the members present in the special meeting convened for this purpose with due notice. For dissolution of the

Society also, similar approval is required. All the documents filed by the Society with the Registrar are open to inspection by any person. This enables transparency and democratic control. Members guilty of offences against the property of the Society are punishable with imprisonment or fine.

3.1.1.3.4 Till 1947, this Act did not undergo any major change; registration remained largely a voluntary effort. Most of the Societies constituted during this period had a poor financial standing and were driven primarily by the strong intent and tenacity of the founding members. Occasionally, they could get financial support from some quarters but the overall health of such Societies stood nowhere in comparison with organisations which were set up as Trusts with considerable wealth and real estate endowments. After Independence, as a consequence of the adaptation orders 1948/50, the Act remained on the statute, but "Societies" being a subject under the State list, it came under the legislative competence of State Governments.

3.1.1.3.5 While the original Act was remarkably clear in not introducing any form of State interference into affairs of such institutions, except routine matters of filing annual statements, many of the State legislations (through post-Independence amendments) went for widespread governmental controls to deal with abuses, malfeasance and nonfeasance of Societies. The legal measures include: State's power of enquiry and investigation; cancellation of registration and consequent dissolution of Societies; supersession of the Governing Body; appointment of administrator; dissolution; and deletion of defunct organisations. State legislations on this subject vary widely. Under Section 25 of the Karnataka Act and Section 32 of the Madhya Pradesh Act, the Registrar on his own motion, and on the application of the majority of the members of the Governing Body or of not less than one-third of the members of the Society, can hold or authorize an enquiry into the constitution, working and financial condition of the Society.

3.1.1.3.6 Some other States which have carried out major amendments in the original Act are Andhra Pradesh, Rajasthan, Tamil Nadu, West Bengal and Uttar Pradesh. The amendments mainly concern the following four issues:

1. Purpose for which Societies can be formed
2. Regulatory powers with regard to change in memorandum of association, bye-laws, alienation of property and investment, amalgamation and dissolution of the Body
3. Powers with regard to submission of annual returns

4. Powers of the State Government with regard to supersession, dissolution or cancellation of registration

3.1.1.3.7 In contrast to the original 1860 Act, the State amendments have considerably expanded the list of purposes for which Societies could be formed and the scope of State intervention in the affairs of the Societies. For example, the Karnataka Act goes much beyond the original purpose of promotion of science, literature, or the fine arts for instruction, diffusion of useful knowledge and includes many other activities connected with conservation and use of natural resources and scarce infrastructural facilities like land, power, water, forest etc. Similarly, with regard to change in the memorandum of association, bye-laws, alienation of property, investment, amalgamation and dissolution; submission of annual returns; and in matters of supersession, dissolution or cancellation of registration, the State has appropriated vast powers. Madhya Pradesh, Andhra Pradesh and Kerala are the other three States which have converted this enactment into a strongly State centric Act. A detailed comparative analysis of the State laws is given at Annexure III (2) of this Report.

3.1.1.4 Trusts, Religious Endowments and Waqfs

3.1.1.4.1 Trusts, Endowments and Waqfs are legally created as modes of property arrangement/settlement dedicated for definite charitable and religious purposes. The details with regard to their incorporation, organisational structure and distribution of functions and powers are governed by the provisions of the specific law under which they are registered. Broadly, such organisations can assume a legal personality in the following five ways:

1. By way of formal registration before the Charity Commissioner / Inspector General of Registration under the respective State Public Trusts Act e.g. the Bombay Public Trusts Act,1950, the Gujarat Public Trusts Act, the Rajasthan Public Trusts Act etc;

2. By invoking interference of civil courts to lay down schemes for governing a Trust under Sections 92 and 93 of the Civil Procedure Code;

3. By registering the Trust deed of a Public Charitable Trust under the Registration Act, 1908;

4. By notifying an organisation in the list of Charitable Trusts and Religious Endowments which are supervised by the Endowments Commissioner of the State or by a Managing Committee formed under the Charitable Endowments Act, 1890 or under other State laws on Hindu Religious and Charitable Endowments; and

5. By creating a Waqf which could be managed under the provisions of the Waqf Act, 1995.

3.1.1.4.2 Trusts

3.1.1.4.2.1 Trust is a special form of organisation which emerges out of a will. The will maker exclusively transfers the ownership of a property to be used for a particular purpose. If the purpose is to benefit particular individuals, it becomes a Private Trust and if it concerns some purpose of the common public or the community at large, it is called a Public Trust.

3.1.1.4.2.2 The first law on Trusts came into force in India in 1882 known as the Indian Trusts Act, 1882; it was basically for management of Private Trusts.

3.1.1.4.2.3 The amended Civil Procedure Code, 1908 also took cognizance of the emerging charity scenario through Sections 92 and 93. In terms of Section 92 of the Civil Procedure Code, 1908, interference of Civil Courts could also be invoked for laying down schemes for governing a Trust, if a breach of original trust conditions is alleged. This can be done by way of a suit filed by either the Advocate-General or two or more persons having an interest in the Trust. While deciding such suits, the Court is empowered to alter the original purposes of the Trust and allow the property or income of such Trusts to be vested in the other person or Trustee for its effective utilisation in the manner laid down by the Court. Section 93 empowers the Collector to exercise these powers in a district with prior approval of the State Government.

3.1.1.4.2.4 Under Schedule 7 of the Indian Constitution, the subject 'Trust and Trustees' finds mention at Entry No.10 in the Concurrent List. 'Charities & Charitable Institutions, Charitable and religious endowments and religious institutions' find place at Entry No.28 of this list. The first legislation on this subject was enacted by the then State of Bombay in 1950. Known as the Bombay Public Trusts Act, 1950, it was meant to deal with an express or constructive Trust for either public, religious or charitable purposes or both and included a temple, a math, a Waqf, or any other religious or charitable endowment and a Society formed either for a religious or a charitable purpose or for both and registered under the Societies Registration Act, 1860 – Section 2(13).

3.1.1.4.2.5 When the erstwhile Bombay province was bifurcated into Maharashtra and Gujarat, in 1960, both the States adopted this very law to govern Trusts and other charitable institutions falling in their jurisdiction. Madhya Pradesh and Rajasthan are the other two States in the country which have enacted their own Public Trusts laws. Other States do not have such specific Public Trusts legislations. Andhra Pradesh, Tamil Nadu and Kerala

have separate Religious Endowments Acts to govern temple properties. Many States have specific legislations to manage particular endowments / charities. In all other cases, Section 92 of the Civil Procedure Code dealing with public charities prevails.

3.1.1.4.3 Religious Endowments

3.1.1.4.3.1 Religious Endowments and Waqfs are variants of Trusts which are formed for specific religious purposes e.g. for providing support functions relating to the deity, charity and religion amongst Hindus and Muslims respectively. Unlike Public Trusts, they may not necessarily originate from formal registration, nor do they specifically emphasise on a triangular relationship among the donor, Trustee and the beneficiary. Religious endowments arise from dedication of property for religious purposes. The corresponding action among the Muslim community leads to the creation of Waqfs. Waqfs tie up the property and devote the usufruct to people.

3.1.1.4.3.2 The first legislation in this direction came up in the later half of the nineteenth century. The Religious Endowments Act, 1863 was basically a law on private endowments which placed a property under the management of Trustee/Trustees under a will for a predefined set of beneficiaries. It was a type of contract between the will maker and the Trustee. During the later part of the British Rule, many Zamindars and merchants created such endowments. In many cases, with the passage of time, such arrangements became hazy and generated a series of civil disputes. The government intervened by introducing a new law called Charitable Endowments Act, 1890. This enactment brought in some element of regulation by establishing a post of treasurer in each State to oversee the functioning of charitable endowments. It was the first step in the direction of State regulation over charities. Towards the beginning of the 20th century, many of the temples and mathas across the country had acquired considerable landed property and funds; often comparable to the holdings of a zamindari. It led to incidents of social tension and civil disputes in the adjoining areas. To deal with this situation, the government enacted a new law in the form of the "Charitable and Religious Trusts Act, 1920" which recognised the existence of such religious bodies as entities different from Endowment Trusts formed for social and charitable purposes. Trustees of such bodies were made accountable for disclosure of the income and the values of the Trust. Civil courts were given proactive powers with regard to management of the property. But any direct intervention of the government through its own functionaries viz. Deputy Commissioners/Collectors and other officials was not yet on the cards.

3.1.1.4.3.3 The scenario changed after 1947. With a view to preventing abuse of funds and to ensure uniform organisational framework for the management of such religious and charitable institutions, many State Governments enacted their own Endowments Acts and virtually took over their management installing government officials as Trustees and managers. The examples are the Madras Hindu Religious and Charitable Endowments Act, 1951; the Travancore-Cochin Hindu Religious Institutions Act 1950; the Bodh Gaya Temple Act, 1949, the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966; and the Karnataka Hindu Religious Institutions and Charitable Endowments Act, 1997.

3.1.1.4.3.4 The Indian Constitution recognizes freedom to manage religious affairs as one of the fundamental rights of its citizen. According to Article 26 - "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

Though, the above provision gives freedom to create Trusts / charitable institutions for religious purposes, it puts some rider on administration of such property "in accordance with law" – Article 26(d).

3.1.1.4.4 Waqfs in India

3.1.1.4.4.1 Under Muslim rule in India, the concept of Waqf was more widely comprehended as aligned with the spirit of charity endorsed by the Quran. Waqf implies the endowment of property, moveable or immovable, tangible or intangible to God by a Muslim, under the premise that the transfer will benefit the needy. As a legal transaction, the Waqif (settler) appoints himself or another trustworthy person as Mutawalli (manager) in an endowment deed (Waqfnamah) to administer the Waqf (charitable Trust).

3.1.1.4.4.2 As it implies a surrender of properties to God, a Waqf deed is irrevocable and perpetual.

3.1.1.4.4.3 In consonance with the spirit of Islam, Indian Muslim rulers generously dedicated property such as land and its revenue rights to Waqf created with the purpose of maintaining mosques, tombs, orphanages (yatimkhanas), madrasas etc. Land could also be Waqfed for the creation of a graveyard. In many cases, donations to a Waqf were made with the intent of promoting the tenets of Islam. Under Muslim rule, the presence of Islamic courts overseen by Qazis ensured that the Mutawallis discharged their duties fairly. Mismanagement of Waqf property was considered breach of the trust reposed in them for which they were duly punished.

3.1.1.4.4.4 In the 14th century, Sultan Allauddin Khilji came down heavily on a number of Mutawallis. During the Mughal rule, Akbar appointed an Inquiry Officer to go into the allegations of misappropriation of Waqf funds by Shaikh Hassan and removed him from Mutawalliship. Ain-e-Akbari records an instance when Akbar dismissed many Qazis who had taken bribes from the holders of Waqf lands[9].

3.1.1.4.4.5 After the collapse of the Mughal Empire, for a long period, the Waqf administration remained loosely controlled. During the first phase of the British Rule in India, the colonial administration too, apart from maintaining oversight over endowments, did not give much attention to this issue as they had a very scanty knowledge of the Islamic legal system. After 1857, when the British started expanding the Comman law regime in the country, they began exercising control over Waqfs. Their interference was mostly on charges of corruption in management of Waqf properties. Immediately after the revolt of 1857, the British Government confiscated Waqf properties such as the Jama Masjid and the Fatehpuri Mosque in Delhi. They were restored to the Trustees (Mutawallis) only after the enactment of the Charitable and Religious Endowments Act by the government in 1863. Another practice the British came down heavily on was the attempt to create family Waqfs by wealthy Muslim families desirous of keeping their property within the family yet safe from future sell-off by irresponsible progeny. In 1894, the Privy Council spoke of such efforts as concealed means for the aggrandizement of family, and noted that their provision for charity is so illusory that as long as the lineage of the donor family continues, the poor do not have any chance of receiving even a rupee from the Waqf.

3.1.1.4.4.6 The first specific law on the subject came only in 1913 when the British Government enacted the Mussalman Waqf Validating Act, 1913. Thereafter, a succession of laws came up to streamline Waqf management in India. The following is the list of important legislations enacted on the subject between 1913 and 1995:

(i) Mussalman Waqf Validating Act, 1913, (ii) Mussalman Waqf Act 1923, (iii) Bengal Waqf Act 1934, (iv) The Hyderabad Endowment Regulation, 1939, (v) U.P. Muslim Waqf

[9]"What is Waqf" by Imtiaz Ahmed Khan and "Waqf Laws and Administration in India" by Akhtar Hussain and Khalid Rasid

Act, 1936, (vi) Delhi Muslim Waqf Act, 1943, (vii) Bihar Waqf Act, 1947, (viii) Bombay Public Trusts Act, 1950, (ix) Dargah Khwaja Saheb Act, 1955, (x) Central Waqf Act, 1954, (xi) Waqf Amendment Act, 1959, (xii) U.P. Muslim Act, 1960, (xiii) Dargah Kwaja Saheb Waqf Amendment Act, 1964, (xiv) Waqf Amendment Act, 1969, (xv) Waqf Amendment Act, 1984 and (xvi) The Waqf Act, 1995.

3.1.1.4.4.7 Currently, 300000 Waqfs in India are being administered under various provisions of the Waqf Act, 1995. This Act is applicable throughout the country except for Jammu and Kashmir and Dargah Khwaja Saheb, Ajmer. The management structure under the Act consists of a Waqf Board as an apex body in each State. Every Waqf Board is a quasi-judicial body empowered to rule over Waqf-related disputes. At the national level, there is Central Waqf Council which acts in an advisory capacity.

3.1.1.5 Non-Profit Companies (Section 25 of the Companies Act, 1956)

3.1.1.5.1 Section 25 of the Companies Act, 1956 provides for a mechanism through which an Association can be registered as a Company with a limited liability, if such association is formed for promoting commerce, art, science, religion or any other useful object and intends to apply its profits/income in promoting its objects. The objective of this provision is to provide corporate personality to such Associations but at the same time exempting them from some of the cumbersome legal requirements. This Section reads as –

> *"25(1) Where it is proved to the satisfaction of the Central Government that an association:*
>
>> *Is about to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object,*
>>
>> *Intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members,*
>>
>> *The Central Government may, by license, direct that the association may be registered as a company with limited liability, without addition to its name of the word "Limited" or the words 'Private Limited'."*

3.1.1.5.2 An Association registered under the above provision shall enjoy all the privileges and would be subject to all the obligations of limited companies. However, these entities will be exempted from such of the provisions of the Companies Act as notified by the Union Government under the provisions of Section 25(6) of the Act. The existing limited

companies can also be transformed to a non-profit company under Section 25(3). The companies registered under this provision are subject to such conditions and regulations as the Government thinks fit and on being directed, they would be required to insert such conditions in their memoranda. Their memoranda can not be altered without the prior approval of the Union Government. The Union Government also has the powers to revoke the registration granted under this section after giving an opportunity of being heard [Section 25(7)].

3.1.1.5.3 The non-profit companies registered under this provision have been exempted from several provisions of the Companies Act by way of notification issued under Section 25(6) of the Act which inter alia covers the following:-

- exemptions from publication of names etc. (Section 147);
- liberty to hold general body meetings on public holidays or outside business hours [Section 166(2)];
- reduction of time length of meeting notice to fourteen days instead of twenty one days [Section 171(1)];
- requirement to keep books of account of the past four years instead of eight years [Section 209(4A)];
- exemption from the requirement of government's permission for enhancing the number of directors (Section 259);
- relaxation in holding Board meetings once in six months instead of three months (Section 285) and its quorum (Section 287);
- competence of the Board to decide about borrowing of money, investing of funds or granting of loans by circulation (Section 292);
- exemption from the requirement of intimating to the Registrar the particulars of change in the composition of the Board (Section 303);
- relaxation in matters regarding the amount of loan or purchase of shares that can be made by the company without the government's prior approval (Sections 370 and 372).

3.1.1.6 The main difference between a Trust, a Society and a Section 25 Company can be summarised in the following manner and as indicated in Table 3.1.

3.1.1.6.1 A Society is basically an association formed by seven or more persons with some common objectives for promotion of literature, fine arts, science etc. There may or may not be some common asset to start with but, in course of time, the Society can acquire assets.

Table 3.1: Comparison between Trust, Society and Section 25 Company

	Public Trust	**Society**	**Section 25 Company**
Statute/Legislation	Public Trusts Act like the Bombay Public Trusts Act of 1950	Societies Registration Act of 1860	Companies Act of 1956
Jurisdiction of the Act	Concerned State where registered	Concerned State where registered	Concerned State where registered
Authority	Charity Commissioner	Registrar of Societies	Registrar of Companies
Registration	As Trust	As Society (and by default also as Trust in Maharashtra and Gujarat)	Memorandum and Articles of Association
Stamp Duty	Trust deed to be executed on non-judicial stamp paper of prescribed value	No stamp paper required for Memorandum of Associations and Rules and Regulations	No stamp paper required for Memorandum and Articles of Association
Number of persons needed to register	Minimum two Trustees; no upper limit	Minimum seven; no upper limit	Minimum seven; no upper limit
Board of Management	Trustees	Governing Body or Council / Managing or Executive Committee	Board of Directors/ Managing Committee
Mode of succession on Board of Management	Usually by appointment	Usually election by members of the General Body	Usually election by members of the General Body

Source : www.asianphilanthropy.org

In the case of a Trust, the very basis of its formation is the existence of an asset/ property which has been donated by the will maker for a particular purpose, social or religious. Charitable and religious institutions are special kinds of Trusts which have clear ecclesiastical intent. Waqf is another variant of Trust where the donor is a Muslim. The subjects on which an institution can be registered under the Societies Registration Act, 1860 are practically the same as those on which a Trust could also be formed. The Society, prima facie, is a

democratic entity, as all its members (at least seven in number) have an equal say in its running whereas in a Trust, control over the property remains fully in the hands of the Trustees and depending on the clarity of the will, such a management continues to be in existence for a long time. Government intervenes only when Trustees change or the Trust becomes too old to be managed as per stipulations (cypres) of the original will, or on grounds of malfeasance or abuse of trust.

3.1.1.7 Trade Unions

3.1.1.7.1 In terms of Section 2 of the Trade Unions Act, 1926, a "Trade Union means a combination, whether temporary or permanent, formed primarily for the purpose of regulating relations between workmen and employers or between workmen and workmen or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions."

3.1.1.7.2 The objective of the Trade Unions Act is to provide a legal existence and protection to the Trade Unions as defined above. A Trade Union can be registered under this Act along with the rules formed by them with regard to its objects, use of funds, maintenance of a list of members, manner of appointment of its members and executives, manner of dissolution etc. The concerned Registrar can not refuse registration if all the technical requirements have been fulfilled at the time of filing application and the Union is not held to be unlawful.

3.1.1.7.3 In the original Act, any seven or more members of a Trade Union were eligible to apply for registration under this Act. This however led to multiplicity of Trade Unions in the same establishment over a period of time. In order to address this problem an amendment was made in 2001 and it was provided that no Trade Union of workmen shall be registered unless at least ten per cent, or one hundred of the workmen, whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration. A new Section 9A regarding minimum requirement about membership of a Trade Union was also inserted according to which a registered Trade Union shall at all times continue to have not less than ten per cent, or one hundred of the workmen, whichever is less, subject to a minimum of seven, engaged or employed in an establishment or industry with which it is connected as its members.

3.1.1.7.4 The office bearers and members of the Trade Unions have been given immunity from criminal and civil liabilities for their activities undertaken in order to further the objectives of a Trade Union. However, in case of willful contravention of the provisions of the Act, or fraud or mistake in obtaining registration penal provisions could be invoked and

the registration certificate can be withdrawn and cancelled by the Registrar. The Registrar is appointed by the appropriate government (both Union and State) in respect of each State. He is assisted by Additional and Deputy Registrars.

3.1.1.7.5 A major provision of the Act pertains to the proportion of office bearers to be concerned with a particular industry where the Trade Union has been formed. In terms of Section 22 of the Trade Unions Act inserted in 2001, not less than half of the total number of office bearers of every registered Trade Union in an unorganized sector shall be persons actually engaged or employed in an industry with which the Trade Union is connected. In other cases, all office bearers of a registered Trade Union, except not more than one third of the total number of the office bearers or five, whichever is less, shall be persons actually engaged in the establishment with which the Trade Union is connected. Importantly, it is also provided that no member of the Council of Ministers or a person holding an office of profit (not being an engagement or employment in an establishment or industry with which the Trade Union is connected), in the Union or a State, shall be a member of the executive or other office bearer of a registered Trade Union.

3.1.1.8 International Perspective on Charities

3.1.1.8.1 Beginning with small tuckshops in the early settlements of the USA, voluntary organisations have been in existence in some form or the other in the entire western world over the last two hundred years. During this period, an active relationship developed between the government and the voluntary sector. The United Kingdom, the USA, Canada, France and other countries of Europe have a fairly well developed system for regulation and promotion of this sector.[10]

- In a majority of these countries, revenue officials initially decide whether an organisation is charitable. This approach is based on the assertion that revenue officials are non-partisan in their determination of charity registrations and that the tax authority is in the best position to administer the system of tax deductibility, including determining which organisations are eligible for tax exemption.

- The Charity Commission administers the Charities Act in England and Wales. The Act empowers the Commission to exercise regulatory jurisdiction over all matters concerning charities.

- In the USA and Canada, registration of a charity is a State responsibility but financial and tax regulation is through the Inland Revenue, which is a federal agency.

[10]A Review of Charity Administration in India: Report of Sampradan sponsored by the Planning Commission

- There is easy access to data on charities: (i) there is a Public Register of charities and (ii) it is mandatory for a voluntary organisation to supply information on demand.
- An effective grievance redressal system is in place. There are provisions for appeals against decisions, and graded sanctions for violation of laws.

3.1.1.8.2 Charity Laws in the USA

3.1.1.8.2.1 In the United States, charities are created under the State Law but they are subject to control by both Federal and the State Governments. The charity administration is managed at the Federal level under the Federal Tax Code by way of preferential tax treatment. Charities are granted tax exemption status under Section 501(c)(3) of the Federal Tax Code subject to organisational and operational conditions. Organisations claiming tax exemption must adhere strictly to their intended charitable objectives as provided in the governing document. The Tax Code makes a distinction between Public Charities and Private Foundations for the purpose of regulations. Private Foundations are more strictly regulated as compared to the Public Charities. The Internal Revenue Service (IRS) is responsible for enforcing federal regulations with regard to the administration and governance of charitable organisations.

3.1.1.8.2.2 As stated above, charities are created under State laws which provide detailed guidelines for their incorporation and regulation (Provisions may vary from State to State). The State laws are mainly concerned with (a) the purpose of charities, (b) their organisational structure, and (c) their internal governance. The definition of charitable purposes under State laws is by and large aligned with the definition provided under the Federal Tax Code. State Attorney Generals have been given powers to enforce laws relating to charitable organisations.

3.1.1.8.3 The U.K. Law[11]

3.1.1.8.3.1 The Charities Act, 2006 has completely changed the government-voluntary sector interface in the United Kingdom. The Act provides for the establishment of an autonomous body called Charity Commission to regulate and support the functioning of Charity organisations across England and Wales. There is also a Charity Tribunal to entertain appeals against the orders of the Charity Commission. The law has prescribed guidelines with regard to formation and registration of charities, their fund raising

[11]Based on a document titled, "Charities Act, 2006 – What trustees need to know", published by the Cabinet Office, Office of the Third Sector, United Kingdom.

activities, accounting procedures and submissions of returns. The salient features of the law are discussed below:

Charity, charitable purpose and public benefit, registration, audit, accounts, and returns:

(A) Charity

(i) The UK Act defines a 'Charity' as a 'body or trust which is for a charitable purpose that provides benefit to the public'. It lists 13 activities which come under the definition of a charitable purpose.

(ii) The purposes (or aims) of a Charity are usually set out in its own governing document. In the past, there were four types of charitable purpose (known as 'heads'). These were the relief of poverty; the advancement of education; the advancement of religion; and other purposes for the benefit of the community. Charities relieving poverty or advancing education or religion were presumed to benefit the public. The 2006 Act removes this presumption. Now every Charity needs to demonstrate how it will benefit the public.

(B) Charitable Purpose

(i) The list describes the following activities as charitable :

- prevention or relief of poverty;
- advancement of education;
- advancement of religion;
- advancement of health or the saving of lives;
- advancement of citizenship or community development;
- advancement of the arts, culture, heritage or science;
- advancement of amateur sport;

- advancement of human rights, conflict resolution or reconciliation, or the promotion of religious or racial harmony or equality and diversity;
- advancement of environmental protection or improvement;
- relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- advancement of animal welfare;
- promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and
- other purposes that are currently recognised as charitable or are in the spirit of any purposes currently recognized as charitable.

(C) Registration

(i) Generally, only Charities with an annual income above £5,000 need to register with the Commission. This threshold has gone up from its previous level of £1,000. The registration requirements for 'exempt' and 'excepted' Charities have also undergone change.

(ii) The existing registered Charities with an annual income below the £5,000 threshold can ask to be removed from the register, but they will still remain Charities and will have to abide by Charity Law.

(D) Audit, Accounts and Annual Returns

(i) A Charity that is not a company must have a professional audit of its accounts if the following conditions apply:

- its gross annual income is above £500,000; or
- it has an annual income over £100,000 and assets exceeding £2.8 million;

or, regardless of these conditions, if:

- its governing document states that it must have a professional audit; or

- the Commission orders the accounts of the Charity to be professionally audited.

(ii) A charitable company with an annual income of more than £500,000 or assets of more than £ 2.8 million must have a professional audit.

(iii) All registered Charities that have to submit annual returns to the Commission must do so within ten months of the end of the Charity's financial year. Previously, Trustees of such Charities who persistently failed to submit annual returns; annual reports or accounts to the Commission could be convicted of an offence and fined. The Act changes the definition of the offence to apply to any Trustee who fails to send in one or more of these documents, whether or not the failure is persistent, and increases the penalty for that offence. The offence is condoned if the Trustees are able to show that they have taken all reasonable steps to meet the deadline.

(iv) The auditors of unincorporated Charities have a specific duty to report abuse or significant breaches of Charity Law to the Commission. They already have statutory protection against legal action for breach of confidence or defamation where they do so. The new Act recognises that duty and extends both the duty and the associated protection to auditors of unincorporated charities' and charitable companies' accounts, as well as to reporting accountants and independent examiners of charity accounts.

(E) Institutional Arrangements

(a) The Charity Commission

(i) Under the provisions of Charities Act, 1992, the Charity Commission of the U.K. was able to develop its role as a modern regulator. The Charities Act, 2006 further supports this by establishing a framework which clarifies its objectives and how it should operate. The Commission is now led by a larger and more diverse Board that can better reflect the sector it works with.

(ii) The 2006 Act defines the Commission's objectives and functions, and gives it some general duties which are meant to guide it when performing its functions.

(iii) The Commission has the following objectives:

1. **The public confidence objective:** To increase public trust and confidence in Charities.

2. **The public benefit objective:** To promote awareness and understanding of the operation of the public benefit requirement.

3. **The compliance objective:** To encourage Charity Trustees to comply with their legal obligations in exercising control and management of the administration of their Charities.

4. **The charitable resources objective:** To promote the effective use of charitable resources.

5. **The accountability objective:** To make Charities more accountable to donors, beneficiaries and the public.

(iv) The Commission has been assigned with the following general functions:

- decide whether institutions are, or are not, Charities;
- encourage and facilitate the better administration of Charities;
- identify and investigate when Charities are being mismanaged or misused and take action to put things right or to protect Charity property;
- carry out its new role in issuing public collections certificates;
- maintain an accurate and up-to-date register of Charities, and use this and other information to support its work and help achieve its objectives; and
- provide information and advice or make proposals to the Minister concerned on matters relating to its objectives and functions.

(v) **The duties:** In its work, the Commission must comply with certain duties, as follows:

- the Commission must, as far as is practicable, act in a way which is compatible:
  - with its objectives and which is appropriate for achieving those objectives; and
  - with encouraging charitable giving and voluntary participation in charity work.
- The Commission must, in appropriate cases, consider the need for Charities to be able to innovate or to support innovation which affects Charities generally.
- The Commission must have regard to best regulatory practice. This includes applying the principles that regulatory activities should be proportionate, accountable, consistent and transparent, and targeted only at cases in which action is needed.
- As an organisation, the Commission must have regard to the principles of good corporate governance and to the need to use its resources in the most efficient, effective and economical way.

(vi) The Commission has become a new Body Corporate, with an expanded Board. There is a clear statement of its independence from the Minister.

(vii) The Act allows the Commission to recruit up to four new non-executive Board members. The Act also requires that the Board as a whole has a broad range of knowledge and experience of the operation and regulation of Charities and of the legal framework in which it works. At least one of the Board members must have specialised knowledge of conditions in Wales. This will help to ensure that the Board reflects the diversity of the charitable sector.

(viii) The Act makes it a statutory requirement that it must hold a public Annual General Meeting during which its annual report to Parliament is discussed.

(ix) The Commission must report annually to Parliament on its work, its progress in meeting objectives, the performance of its general duties and the management of its affairs.

(x) The Act preserves the Commission's independence from Ministers and government departments. This contributes to public confidence in Charities.

(b) Its Management

Currently, the governance responsibilities for the Commission in the UK rest with a Board consisting of 9 non-executive members. Corporate decision-making that affects the day-to-day operations of the Commission has been delegated to the Executive group consisting of a Chief Executive who in turn is assisted by four Directors and Functional Heads.

(c) The Charity Tribunal

In the past, the Charities, if dissatisfied with some decision of the Charity Commission, could go in appeal to the High Court. This was prohibitively expensive and complicated, particularly for small organisations. The 2006 Act has established a Charity Tribunal as a first level of appeal. It is convenient, cheaper and less formal. This arrangement allows smaller Charities an accessible means of grievance redressal. Access to the High Court is still possible as second appeal.

3.1.2 Need for a New Legal Framework for Charities in India

3.1.2.1 The multiplicity of charity laws in India has prevented evolution and growth of a proper institutional framework in this sector. While, voluntary organisations often feel harassed in complying with various legal obligations, institutions of the government too have not been effective in regulating the sector and securing legal compliance. Instances of misuse of tax provisions, fraud and poor governance have become frequent. There is need to create an effective institutional mechanism which would provide a supportive environment for the growth and development of charities in this country. In this respect, one could learn from the governance structures as described at Para 3.1.1.8. India being a federal Union, a decentralized institutional setup for charities similar to that existing in the USA, seems to be appropriate. The power of registration and oversight needs to lie with the State Governments.

3.1.2.2 In 2004, the Sampradan Indian Centre for Philanthrophy conducted a study on charities administration in India under the sponsorship of the Planning Commission. The study suggested following four models in this regard:

- ***Model 1 – Maintain the status quo, keeping the existing institutional arrangements as they are,*** *but enhancing their performance by adopting certain recommendations for a more facilitative interface with the public, greater transparency of the regulatory process, measures for securing better compliance, and a better appeals process.*

- ***Model 2 – Create a functionally enhanced Charities Directorate in the Income Tax department, plus State level registering agencies, plus a NPO Sector Agency. The Charities Directorate*** *would be the main regulatory agency, looking after monitoring and compliance, as in Canada and the USA, while the State level registering agencies would exist only for registration function. In addition, there would be an NPO Agency to advise the Charities Directorate. It will comprise of the representatives of the NPO sector, and professionals such as lawyers and Chartered Accountants. It would provide policy guidance, obtain feedback from the sector and set up review mechanism for achieving compliance.*

- ***Model 3 – Create a Charities Directorate and a mandatory NPO Sector Agency****. The difference between this model and the one mentioned above is that the NPO Sector agency would be* ***created by the government*** *as an autonomous Body. It would have its own Governing Body, and professional staff, and would have the general function of promoting effective use of charitable resources by encouraging better management of organisations, and improving governance by providing Trustees with information and advice. It would also be responsible for compliance education function. It would be a permanent forum for dialogue that this sector has been demanding and would be the interface between the government and the sector.*

- ***Model 4 – Create State level Charity Commissions supported by a NPO Sector Agency. There would be an Appeals Tribunal too.*** *This model suggests setting up a Charities Commission on the UK model. It would be concerned not only with financial regulation but also with the promotion and development of the sector.*

3.1.2.3 A Model law for Societies and Trusts

3.1.2.3.1 Non-Profit / Voluntary Organisations in our country operate on a wide variety of issues covering almost all aspects of socio-economic development and polity. There are separate laws under which Societies, Trusts, charitable institutions, religious endowments and Waqf etc. can be set up. For illustration, the Societies Registration Act, 1860 is the law under which Societies of different hues are registered in India. 'Societies' being a State subject, the 1860 law has been adopted with some amendments by twelve States. The States such as Rajasthan, Karnataka, West Bengal, Madhya Pradesh, Tamil Nadu, Manipur, Meghalaya, Jammu and Kashmir and Andhra Pradesh etc. have enacted their own law on this subject. Kerala, Andhra Pradesh and Tamil Nadu and many other States have exclusive laws for governing religious endowments. Maharashtra, Gujarat, Rajasthan and Madhya Pradesh have specific Public Trusts laws to govern all kinds of Trusts and endowments (religious / non-religious) under their jurisdiction. Then, there are endowment specific laws such as the Bodh Gaya Temple Act, 1949. In spite of all the above legislations, if any ambiguity crops up, the Courts take recourse to Section 92 of the CPC.

3.1.2.3.2 Diversity of laws across the States has given rise to emergence of non-uniform practices in the management of voluntary organisations. If an institution registered in one State desires to expand its activities to any other area, it needs to comply with a different set of legal requirements. The Commission is of the view that the management of civil society organisations will be far less complicated if a uniform legal regime for regulation of charity institutions is put in place for the entire country. Currently, 'Societies' is a subject under the State list (Entry 32) of Schedule 7 of the Constitution, whereas 'Trust' is in the Concurrent list (Entry 10). "Charities and charitable institutions" are also covered under the concurrent list (Entry 28). In order to create a uniform legal environment across States, the Commission suggests that the Union Government should formulate a comprehensive model law covering both Societies as well as Trusts. This model law could be sent to the States who could adopt it with suitable modifications. While, it will not be possible here to suggest a detailed draft, the broad framework and the views of the Commission on some illustrative issues are indicated in the following paragraphs.

3.1.2.4 Key Elements of the New Law

3.1.2.4.1 The following three key elements would need to be explained in the proposed law:

(i) Defining Charity and Charitable Purpose

(ii) Institutional Mechanism

(iii) Interface with the State Government

(i) Defining Charity and Charitable Purpose

The new law will need to draft a composite definition based on the contents of the original Societies Registration Act, 1860, various amended State Acts, the Bombay Public Trusts Act, 1950, Section 92 of the Civil Procedure Code and Section 2(15) of the Income Tax Act, 1961. The definition of "Charity" and "Charitable Purpose" provided in the UK Law as indicated in paragraph 3.1.1.8.3.1 covers almost all the objectives listed in the extant Union and State laws and the same can be kept in mind while formulating the new legislation. Experience across the world shows that defining 'Charity' and 'Charitable Purpose' is a complex issue. The Commission is of the view that there is need to set up an Inclusive Committee which will examine this issue comprehensively and suggest an appropriate definition which would inter-alia soften charities-government relationship, particularly in tax matters.

(ii) Institutional Mechanism

In place of the present charity administration consisting of a Charity Commissioner / Inspector General of Registrations as existing in the States, the proposed law would provide for a new governance structure in the form of a three-member Charities Commission in each State with necessary support staff. It will be an autonomous Body created by law. It will have laid down functions and responsibilities and will be accountable to the State assembly through a nodal Minister. The Chairman of the Commission should be a law officer drawn from the cadre of District Judges. Out of the other two members, one should be drawn from the voluntary sector and the other should be an officer of the State Government. The functions of this Commission would be to regulate and support the sector. The law would also provide for creation of a Charities Tribunal in each State which will have appellate jurisdiction over the orders of the Charities Commission.

The functions of the Charities Commission would include:

- Registration of Non-Profit Organisations (NPOs).
- Maintaining a public register of NPOs.
- Receiving reports from NPOs.
- Audit and monitoring.
- Disseminating information on good practices / methods of management among voluntary organisations.
- Holding public discussions / consultations.
- Bringing out simple publications to educate the public about NPOs.
- To review periodically the social and economic environment of the charities.
- Acting as a permanent forum for dialogue with the sector on issues of policy and regulation.
- Administering sanctions and penalties for non-compliance.
- Resolving grievances.

The Charities Commission should be free to recruit its own staff like any other non-profit corporation and train them, and pay remuneration according to non-profit sector practices. This will give stability to the organisation and also make it possible to hire staff who have a commitment to non-profit work.

(iii) Interface with the State Government

At present, a non-profit organisation's interaction with the State authorities consists of the following – (a) Government's power with regard to grant of permission for alteration of the memorandum, alienation of property or inclusion of the change report; (b) Government's powers of inspection; (c) Powers to cancel registration; (d) Powers to appoint an administrator; (e) Powers to modify / anull a decision of the Governing Body; (f) Powers to dissolve the institution; and (g) Powers to impose penalty. In view of such vast powers available to the State machinery, there is a feeling among the NPOs that the sector has virtually become a subordinate formation of the State Government. The Commission is of the view that the NPO sector should have freedom in their functioning (as per the intent of their memorandum). Government's interface with these organisations should be minimal and the government should work only as a facilitator and developer.

The discretionary powers acquired by various State Governments during the course of time need to be dispensed with.

3.1.2.4.2 In addition to the above, the proposed law will need to take care of the following important functional issues which are critical to a voluntary organisation's working:

(a) Alteration in the memorandum – As per the provisions of the Societies Registration Act (as applicable to Gujarat and various other States), the memorandum of association of a Society can be altered only through a special resolution supported by a majority of not less than 3/5th of the total membership of the Society. It was brought to the notice of the Commission that this provision is highly impractical. If a Society has a large and diverse membership spread over a large geographical area, seeking attendance of 3/5th of the total membership is very difficult. The Commission is of the view that the proposed legislation should take care of this issue. A more practical approach would be to insist that such a special resolution is passed by a majority of not less than 3/5th of the total members of the Society present at the meeting. It would be in line with the provisions of the Companies Act, 1956, where a special resolution can be passed by 3/4th of the shareholders present at the meeting.

(b) Approval on change report – Section 22 of the Bombay Public Trusts Act (BPT Act), 1950 deals with 'change' in the entries of the Public Trusts Register (PTR) pertaining to name, composition, organisational structure, immovable property etc. Whenever an institution applies for a change in the PTR, it has to face a cumbersome and time taking process. It may often take months before the applicant gets the approval letter from the office of the Charity Commissioner. The Commission is of the view that the process needs to be simplified and made time bound. The proposed new legislation should have a provision under which the approval on change report would need to be given within a prescribed reasonable time limit (say 60 days).

(c) Alienation of immovable property – Section 36 of the BPT Act, 1950 deals with 'alienation of immovable property of a Public Trust'. When a Public Trust submits a proposal for transfer of its property for approval of the Charity Commissioner, its disposal takes time. There is a view that the Trustees should have full powers to manage the properties in the best interests of the organisation. But the contrary argument emphasises that the delay in such cases is not only because of the intractable attitude of the authority, but it is also on account of the Trustees' attempt to undervalue the property for private gains. The Commission is of the view that in the new enactment there needs to be a balance between the two approaches. The Authority must have reasonable opportunity to critically examine

such proposals in order to check misuse. At the same time, there is need to make the disposal of such matters time bound.

(d) Contribution by Public Trusts to the State Government – Section 58 of the currently applicable Bombay Public Trusts Act deals with 'contribution by Public Trusts to Public Trusts Administration Fund.' Currently, Trusts have to pay 2% to 5% of their gross revenue to the State Government under this clause. For many of the organisations, this amount appears to be excessive. The Commission is of the view that there is need to have a relook at this issue.

3.1.2.5 **Issue of giving priority attention to larger Organisations** – India has a large number of voluntary sector organisations, a majority of whom are very small in terms of their scale of operations. Currently, the overseeing authorities spend a disproportionately large amount of time and staff on routine matters relating to smaller charities and the attention given to larger organisations is inadequate and ineffective. Thus, many important and urgent matters of such institutions remain unattended or take inordinately long to get settled. Such delays often stifle fundflow to ongoing projects. The Commission is of the view that there is need to introduce provisions which would take away the burden of routine work relating to smaller charities from the authorities. This could be in the form of prescribing a threshold annual income for the voluntary sector. Charities having incomes below this level will have fewer compliance requirements with regard to submission of returns, reports, permissions etc. However, in case any irregularity is detected, they will be liable for punitive action as prescribed under the law. To start with, the cut off limit could be set at Rs. 10 lakhs which could be reviewed for upward revision once in five years. Such a provision, on the one hand, would create a conducive atmosphere for smaller charities and on the other, would enable the authorities to find time to attend to the needs of institutions engaged in major works.

3.1.2.6 Recommendations:

a) **The Union Government should draft a comprehensive model legislation covering both Trusts and Societies in lieu of the existing laws on Societies, Trusts, Endowments and Charitable Institutions etc.**

b) **In place of the present charity administration consisting of a Charity Commissioner / Inspector General of Registrations as existing in the States, the proposed law should provide for a new governance structure in the form of a three member Charities Commission in each State with necessary support staff for incorporation, regulation and development of**

Charitable Organisations. The Chairman of the Commission should be a law officer drawn from the cadre of District Judges. Out of the other two members, one should be drawn from the voluntary sector and the other would be an officer of the State Government. In addition, the State should also have a Charities Tribunal which would exercise appellate powers over the orders of the Charities Commission.

c) **The proposed model legislation should indicate a cut off limit with regard to the annual revenue of a Charity. Organisations having an annual income below this threshold will have lighter compliance requirements with respect to submission of returns / reports / permission etc. However, if irregularities are detected in their functioning, the organisations will be liable for legal and penal action. To start with, the cut off limit could be set at Rs.10 lakhs which could be reviewed for upward revision once in five years.**

d) **The government should set up an Inclusive Committee which will comprehensively examine the issue of defining 'Charity' and 'Charitable Purpose' and suggest measures to "soften" charities-government relationship, particularly in tax matters.**

e) **The model legislation should take into consideration the views and suggestions made above with regard to the following issues of charity administration:**

   i. **Interface with the State Government**

   ii. **Alteration in the memorandum**

   iii. **Approval on change report**

   iv. **Alienation of immovable property**

   v. **Contribution by Public Trusts to the State Government**

3.2 Revenues of the Third Sector

3.2.1 Third Sector Organisations in India raise funds primarily from four major sources viz. individuals, private foundations (national as well global), business houses and government. In recent years, the diaspora is also playing a leading role in contributing to social causes.

3.2.2 The character of funding to voluntary organisations is highly skewed. Organisations which take up contemporary issues and are able to project their requirements articulately through the media are able to secure the bulk of funding, leaving the residue for smaller and not-so-savvy organisations.

3.2.3 Funding also depends on the nature of activity - some sectors like conservation of environment, nutrition supplement and creation of urban facilities are more popular and "glamorous" and therefore attract more funds, while others like human rights, gender equality and cultural preservation often have to suffer for want of resources. A survey conducted by the Consumer Education and Research Centre in Ahmedabad in the early 90s found that out of over 8,000 Trusts and 2,000 Charitable Societies registered in the city, only 144 had annual incomes of over Rs. 100,000 (US$2,173) whereas the combined total was Rs.1,440 million.[12]

3.2.4 Individual Donations

3.2.4.1 In India, individual donations to charity organisations has been meagre. While the quantum of donation to the voluntary sector from government and foreign donor sources has increased considerably during the past decade, private philanthropy by individuals, Trusts, foundations, and corporates has not expanded commensurately. This kind of fund raising consists of direct donations by the public (either a one time act or a recurring transaction). Donations may also come through by patronizing sales of items like greeting cards, diaries, handlooms and handicraft products and by organizing events like art auctions, music programes etc.

3.2.4.2 Individual donation is more prevalent during major crisis situations. During the earthquakes in Gujarat and Maharashtra, and the cyclone in Orissa, there were generous donations from individuals as well as corporate organisations.

3.2.5 International Aid

3.2.5.1 Bilateral Assistance

3.2.5.1.1 Many agencies such as the Department for International Development (DFID) (British Government), Swedish International Development Cooperation Agency (SIDA) (Swedish), Norwegian Agency for Development Cooperation (NORAD) (Norway), and Danish International Development Agency (DANIDA) (Denmark) are permitted to support NGOs directly without seeking specific project approval from the Government of India. However, some of the agencies need specific project approval of the Government before they can finance an NGO. In addition, bilateral fund support to the Government of India

[12] www.cercindia.org

or to a State Government or to other government agencies, often, specifies the percentage of funds that must be spent through non-governmental organisations. The recent increase in bilateral funding to the government has increased the flow of funds to NGOs.

3.2.6 Corporate Philanthropy

3.2.6.1 Donations

3.2.6.1.1 The system of corporate donation for philanthropic activities has a history in India. In earlier times, merchants supported relief activities during the times of flood or famine. They built temples, promoted schools, and encouraged artistic pursuits. In the pre-Independence era, many big business houses set up Trusts and Foundations to support schools, colleges and charitable hospitals. Later, some of the multinationals also joined in.

3.2.6.1.2 An Action Aid study found that, on the corporate front, only 36% of the 647 companies surveyed had some sort of policy (21% of these or 8% of the total companies had a written policy) to get involved in social development activities. The companies which were involved in developmental activities, primarily made cash contributions, followed by helping the disadvantaged with employment opportunities. Other activities included donation of company assets, donating staff time and purchasing materials produced by NGOs. Only 16% had some kind of partnership with the NGOs, while 80% dealt directly with the beneficiary community. Most of these partnerships existed in the urban areas. The partnerships were also not with developmental NGOs, but were more often with institutions like Rotary and Lions Clubs.

3.2.6.2 Corporate Social Responsibility (CSR)

3.2.6.2.1 'Corporate Social Responsibility' may be defined as a corporate entity's commitment to welfare of society and community and its adherence to ethical values. The term may be relatively new in the Indian lexicon but the concept is certainly not. Traditions of "trusteeship", "giving" and "welfare" have existed since long in our society. The concept of social good has always been part of the Indian psyche. From the beginning of the 20th century, business and industry in India have in different ways been paying attention to their obligation and commitment towards society and the community. The large number of schools, colleges, hospitals and other charitable establishments, which were set up in the 20th century in different parts of the country, are fine examples of such social commitment.

3.2.6.2.2 In recent years, CSR has shifted from the domain of charity to the domain of standard business practices. Together with 'profit' and 'growth', it is one of the essential

parameters which define a business. Stakeholder awareness, increasing power of civil society, intensity of competition and environmental challenges are some of the factors which have increased the emphasis on CSR in recent times.

Box 3.1: Definition of CSR

The World Bank defines corporate social responsibility (CSR) as, "the commitment of business to contribute to sustainable economic development working with employees and their families, the local community and society at large to improve their quality of life, in ways that are both good for business and good for development".

3.2.6.2.3 Companies in India now explicitly recognize their social responsibility and many of them allocate sizable resources to it. The TATAs, ITC and the Azim Premji Foundation are among major corporate entities which have linked their business plans with ethical and social commitment. The TATAs have fully dedicated Foundations / philanthropic establishments through which they take up important issues of social / economic empowerment of the community and society as a manifestation of their commitment towards citizens. Besides, their manufacturing units too take up development work in the local areas. ITC has a dedicated social development team which anchors all corporate social responsibility initiatives. Instead of having a separate Foundation for taking up standalone philanthropic activities; ITC integrates it with its regular business plans. It fulfils its social responsibility by forging public-private partnership as a business link in the areas of social forestry, integrated watershed development, web enablement of the tobacco farmers, e-choupal's farm extension services and livestock development. Another notable example is the Azim Premji Foundation started in the year 2001. It is a non-profit organisation which works extensively on "enhancing the quality of primary education being imparted in the government schools in the rural areas". The Foundation firmly believes that merely creating islands of excellence in few pockets is not of much consequence and hence it aims at bringing multi-dimensional systemic changes in the whole environment of primary education across the country. Currently, it is carrying out a Learning Guarantee Programme (LPG) in five States viz. Karnataka, Madhya Pradesh, Gujarat, Rajasthan and Uttarakhand. It also provides technology support to 16,017 primary schools located in 13 States of the country.

3.2.6.2.4 The Commission acknowledges that over the years, many of the corporate houses have undertaken significant work in sectors like primary/adult education, livestock development, tank irrigation, sanitation, women and child nutrition and provision of drinking water. The Commission feels that while taking up such activities, the Corporates should take into account the prevailing needs of the local people. It also needs to be ensured that there is no overlap/clash with other similar programmes in the area.

3.2.6.2.5 Recommendations:

a) **When a community benefit project is taken up by a corporate entity, there should be some mutual consultation between the company and the local government so that there is no unnecessary overlap with other similar development programmes in the area.**

b) **Government should act as a facilitator and create an environment which encourages business and industry to take up projects and activities which are likely to have an impact on the quality of life of the local community.**

3.2.7 Government Funding

3.2.7.1 Both the Union and State Governments provide considerable budgetary support to voluntary organisations on a wide range of activities like rural technology, concerns of social welfare, primary education, maternal and child health care, adult education, empowerment of women and rehabilitation of the disabled. Apart from making direct disbursement of grants to voluntary agencies, Government of India has also set up especially empowered Autonomous Bodies to provide support to the activities of the Third Sector Organisations (TSOs). The Central Social Welfare Board (CSWB) and National Institute of Public Cooperation and Child Development (NIPCCD) are two such prominent Bodies dealing with Government – NGO interface in the social welfare sector, while the Council for Advancement of People's Action and Rural Technology (CAPART) is an agency which finances voluntary organisations to stimulate grass roots participation and encouragement of rural technology. There are more than 437 such autonomous organisations functioning under various Ministries of the Government of India excluding those under Scientific Departments. The Commission will examine this issue in its report on TOR No.1 i.e. "Organisational Structure of the Government of India".

Another way by which the State provides support to the charity sector is through tax concessions of various kinds. This issue has been discussed in detail at paragraph 3.3.

3.2.7.2 Accreditation of Voluntary Organisations

3.2.7.2.1 Accreditation is a formal recognition of the achievements of an organisation, linked to some internal / external norms such as commitment to long term aims and objectives, organisational ability, adherence to financial norms, transparency and accountability etc.

3.2.7.2.2 A large number of voluntary organisations receive grants from government for a variety of purposes such as social and welfare services, surveys, studies, monitoring, evaluation etc. These organisations vary greatly in their capability and credibility. In the absence of any system of accreditation / certification, the government agency at both Union and State level have found it extremely difficult to distinguish between organisations who value for quality and those which have been set up almost solely for the purpose of receiving government grants. In this context, it is widely recognized that there is need to have a system of accreditation and certification for Voluntary Organisations, which would facilitate and bring transparency in the Government-NGO partnership, particularly in the work of funding agencies. The procedure adopted for accreditation / certification should not be so complex as to lead to harassment, delay and corruption.

3.2.7.2.3 It is generally agreed that accreditation could be best done by the voluntary sector itself. However, attempts to form a Self-Regulatory Body of voluntary organisations in the country have not succeeded so far. There is a feeling that government needs to be involved in this process.

3.2.7.2.4 The process of accreditation and certification undertaken for the voluntary sector should be based on the following principles:-

a. Accountability and transparency

b. No ranking or ratings

c. Norms will have to be compatible to the sector

3.2.7.2.5 The Steering Committee on the voluntary sector for the Eleventh Five Year Plan set up by the Planning Commission considered this issue and recommended setting up of a National Accreditation Council (NAC) with five regional centres in the West, North, East, North-East and South India and major metros in due course. The NAC could consist of academics from schools of social work, leaders of the voluntary sector networks, retired bureaucrats who have worked in NGOs after retirement for at least five years and corporate association members from CII, ASSOCHAM, FICCI etc. and NGO leaders of repute. The Assessors would be invited from different fields such as schools of social work, the schools of management like Institute of Rural Management, Anand (IRMA), accounting firms like Grant Thornton, CRISIL, Deloitte and Price Waterhouse Coopers, or Financial Management Service Foundation (FMSF) or Account Aid or Foundations such as GIVE INDIA etc. Audit firms cannot accredit their own clients as this would lead to a conflict of interest. The National Accreditation Council would empanel them on the basis of criteria such as organisational assessment capacity, exposure to voluntary sector and reputation for

independence and credibility. The National Accreditation Council would award accreditation to Voluntary Organisations based on documentation and evaluation of the assessors.

3.2.7.2.6 It has been further recommended that in the initial pilot phase, when the concept of accreditation is sought to be popularized, the cost should be borne by the National Accreditation Council out of its own corpus, which could be supplemented by contributions from large donors. Later on when it is firmly established, there could be two broad options for meeting the expenses of the social auditors: (i) charge an accreditation fee linked to the size of the annual budget of the NGO, based on a slab system (for very small VOs, the NAC could consider subsidizing the expenses completely); and (ii) charge the expenses on a pro-rata basis on the donors.

3.2.7.2.7 The Commission has carefully considered the whole issue and agrees with the view that:

(a) Accountability to stakeholders and transparency in the functioning of the voluntary sector is essential; therefore, there is a need for accreditation of VOs through an independent agency like the National Accreditation Council. This Body could be set up by law.

(b) Accreditation does not amount to ranking or rating of VOs. It is a stamp of transparency, accountability and credibility.

(c) To start with, the government needs to place an appropriate corpus of fund at the disposal of the NAC, which could be supplemented by donations. Thereafter, the Council could finance its activities by charging fees from its clients. Such system of accreditation/certification should be applicable only to those organisations which seek funding from government agencies. In order that the parameters adopted are clear and transparent and the actions taken by NAC are independent, it is advisable that the constitution of the Council, its functions and procedures are clearly spelt out in the law.

3.2.7.2.8 Recommendations:

a) There should be a system of accreditation / certification of voluntary organisations which seek funding from government agencies.

b) Government should take initiative to enact a law to set up an independent Body – National Accreditation Council – to take up this work. In the beginning, Government may need to provide a one time corpus of funds to this organisation.

c) **The above law should provide details with regard to the constitution of the Council, its functions, its powers to levy appropriate fees from the applicants, and other related matters.**

3.3 Charitable Organisations and Tax Laws

3.3.1 The Income Tax Act, 1961 is a Union legislation, which applies to all voluntary organisations (Trust, Society or Company) uniformly throughout India. Any voluntary (non-profit) organisation engaged in a charitable work, defined as "relief for the poor, education, medical relief, and the advancement of any objects of general public utility not involving any activity for profit", can claim tax exemptions and other benefits under the Income Tax Act, 1961 subject to the conditions and restrictions contained therein.

3.3.2 Broadly, the Income Tax Act provides benefits to charitable organisations in the following three ways:

I. Certain incomes are not included in the total income

1. Section 10 describes incomes which do not form part of the total income; the sub-sections related to charitable organisations are as under:

Section 10(23C) (iv) and (v) states that income of institutions established for charitable purposes, which are approved by the prescribed authority, shall not to be included in the computation of total income of the institution and shall not be subject to tax.

Prior to June 2007, approval for grant of exemption under these Sections was being given by the Union Government by way of notification, for a period of three years. After June, 2007 to streamline the procedure, these powers have been delegated, and the Chief Commissioners / Director Generals concerned are now the prescribed authority to approve grant of such exemptions. Approval for exemption under the above provision shall be granted or an order rejecting the application shall be passed within twelve months from the end of the month in which such application was received. The order shall be valid for the life-time of the Trust so long as there is no violation of the statute.

2. Sections 11 to 13 provide for the assessment of Trusts that are wholly for charitable or religious purposes. Under these provisions, Section 11 provides that income from property held for charitable or religious purposes shall not be included in the total

> income of the Trust etc. if the income is applied as per the provisions of the Act. This shall apply if the income derived from property held under a Trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application later, the income so accumulated or set apart is not in excess of fifteen per cent of the income from such property.

The non-profit organisation must utilize 85% of its income in any financial year, on the objects of the organisation. In case the organisation is unable to spend 85% of its income in the financial year due to late receipt of income or any other reason, the Trustees may exercise the option to spend the income during the immediately following twelve months. Income can also be accumulated for a period ranging from one to five years (prior to 1-4-2002 the maximum period for which the income is to be accumulated or set apart was ten years), for specific projects, subject to the following conditions:

i. The funds of the organisation are invested / deposited only in approved securities specified under Section 11(5) of the Income Tax Act.

ii. No part of the income or property of the organisation is used or applied directly or indirectly for the benefit of the Founder, Trustee, relative of the Founder or Trustee, or a person who has contributed in excess of Rs.50,000/- to the organisation in a financial year.

iii. The organisation files its return of income annually within the prescribed time limit.

Section 11 also provides that income of the Trust etc. in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the Trust or institution shall not be treated as income of the Trust etc.

Section 12 provides that voluntary contributions received by a Trust/Institution created wholly for charitable or religious purposes shall be deemed to be income derived from property held under Trust and shall not be included in the income of the Trust as provided in Section 11.

Section 12A (1) (aa) importantly provides that the provisions of Section 11 and Section 12 are applicable to the income of any Trust or Institution only if the Trust has made an application for registration of the Trust or Institution in the prescribed form and manner to the Commissioner and such Trust or Institution is registered under Section 12AA.

Under Section 12AA, the authority for grant/ rejection of the registration is the Commissioner of Income-tax. Every order granting or refusing registration is by statute required to be passed before the expiry of six months from the end of the month in which the application was received. No order refusing the permission shall be passed unless the applicant has been given a reasonable opportunity of being heard. The Commissioner may examine the documents submitted and conduct an inquiry on the objects and activities of the Body. The following documents are required to be submitted for obtaining registration under this Section:

i. Copy of the instrument by which the Institution has been created;

ii. Other documents in support of the above.

iii. Copies of accounts of the Institution since its inception or for the last three years whichever is less.

II. Deductions to be allowed from the profit and gains of business and profession

1. To encourage expenditure on scientific research, Section 35 of the Income Tax Act provides for weighted deductions to a tax payer to the extent of 125 per cent of the sum paid by him to an approved scientific research association, approved university, college, company doing research or other institution to be used for scientific research subject to certain specified conditions. The Union Government is the authority that approves the companies, institutions, universities etc. An order approving/rejecting the application under this Section is required to be issued by the Union Government within the period of twelve months from the end of the month in which such application was received. With effect from 1st April, 2006, recognition granted to the organisation, institution etc. is valid till its existence, unless withdrawn by the Union Government.

2. Section 35 AC of the Income Tax Act also provides for deductions to be allowed to a tax payer in respect of expenditure on eligible projects or schemes from the business incomes of the assessee where the assessee incurs any expenditure by way of payment of any sum to a public sector company or a local authority or to an association or institution approved by the National Committee for carrying out any eligible project or scheme. Approval for the project or scheme is given by the Union Government, on the recommendation of a National Committee.

The Income Tax Rules have specific provisions with regard to a fourteen-member National Committee and the manner of its functioning under Rules 11-F to 11-O. The provisions also specify the types of projects which qualify for benefits under this section. Approvals are granted by Government (Ministry of Finance) on the recommendation of the National Committee for a maximum period of three years. It can be further extended subject to the satisfaction of the Committee and the approval thereafter by the Union Government.

3. Section 35 CCA of the Income Tax Act also provides for deductions to be allowed in respect of expenditure for carrying out rural development programmes from the business incomes of assessees. Section 35 CCA broadly states, where an assessee incurs any expenditure by way of payment of any sum to an association or institution, which has as its object the undertaking of any programme of rural development, the assessee shall be allowed a deduction of the amount of such expenditure incurred during the previous year.

III. Deductions to be made in computing total income for the purposes of calculating tax liability on the total income

1. Donors (individuals, associations, companies, etc) are entitled for a deduction of 50% of donations made to the registered charitable organisations enjoying tax exemption status under Section 80G of the Income Tax Act. However, there is a limit up to which the benefit can be availed by the donor as provided in the Act. This benefit is subject to conditions imposed under sub-section 5 of Section 80G of the Income Tax Act.

In order to enable the donor to avail benefits under this Section, a charitable organisation requires approval by the Commissioner of Income Tax in accordance with Rule 11AA of the Income Tax Rules. The applicant needs to submit the following documents for obtaining such approval:

i. Cost of registration granted under Section 12A or copy of notification issued under Sections 10(23) or 10(23C);

ii. Notes on activities of institution since its inception or during the last three years, whichever is less;

iii. Copies of accounts of the institution since its inception or for the last three years, whichever is less.

On being satisfied, the approval will be granted by the Commissioner and no order of rejection shall be passed without giving an opportunity of being heard. The validity of such approval is for a maximum period of five years. Rule 11AA provides time limit for decision on the application which should not exceed six months from the date of application. However, in computing the period of six months, time taken by the applicant in complying with the directions of the Commissioner is excluded.

3.3.3 To sum up, there are four areas of interface between voluntary organisations and the Income Tax Act. First is getting the exemption approved by the prescribed authority under Section 10(23C) of the Income Tax Act. Second is the process of getting registered as a charitable institution under Sections 12A and 12AA (in order to claim benefits under Sections 11 and 12). Third is getting 80G exemption certificate status. And fourth is claiming deductions under Sections 35, 35 AC, and 35 CCA. The procedures to be followed for availing of the benefits under the respective provisions of the Income Tax Act have been discussed briefly in the above paragraphs.

3.3.4 Simplification of Procedure under Section 12AA and Section 80G

3.3.4.1 As indicated above, approval under Section 80G needs to be granted within six months provided that in computing the period of six months, the time taken by the applicant in complying with the directions of the Commissioner shall be excluded. Several organisations brought to the notice of the Commission that the actual grant of an 80G exemption certificate sometimes takes longer due to this proviso. In fact, there have been instances where, by the time a certificate is made available to the applicant, the case becomes due for seeking renewal. Suggestions have been made that under Section 80G the exemption certificate should be granted to a Charity in perpetuity; there should be no need for its renewal. The tax authorities in any case have the powers to cancel the registration if any misuse/malfeasance is detected. The contrary argument is that as there are a large number of such institutions in the country (with many of them obtaining substantial donations every year), and as only a limited number of cases are now being taken up for scrutiny, it may not be physically possible for the Income Tax Department to keep a continuous track of their transactions. The necessity of securing renewal of the 80G certificate at a prescribed interval would require an organisation to apply afresh to the department with all details. A periodic revalidation clause is thus necessary to keep the organisation on the radar of the income tax authorities.

3.3.4.2 The Commission recognizes the need for simplifying the administrative procedure. To reduce the time taken for granting registration to organisations under Sections 80G and 12AA, the Commission is of the view that the order giving approval or rejecting the

application under these sections could be passed within a time limit of ninety days by the prescribed authority. In case of rejection, the assessee has the option to go in appeal before the Appellate Tribunal, against an order passed by the Commissioner under Section 12AA and Section 80G of the Income Tax Act, 1961.

3.3.5 Extending Time Limit for Accumulation of Surplus Income

3.3.5.1 Under the existing provisions, surplus income can be accumulated for a maximum period of five years for specific projects. To avail this facility, the accumulated income, during the period of accumulation, has to be invested in a manner as prescribed under Section 11 (5) of the Income Tax Act.

3.3.5.2 It was brought to the notice of the Commission that many of the Trusts / charitable institutions are engaged in projects with significant outlay on infrastructure. It may, often, not be possible to complete such large projects within the given time limit. Restricting the accumulation of surplus from income to a period of five years may in fact impede the project's completion. The Commission is of the view that in modern times, buildings and infrastructure are critical components of a charity's functioning (hospitals, old age homes/ orphanages, educational institutions etc.). Therefore, the period of accumulation needs to be enhanced.

3.3.6 Rationalisation of Procedure under Section 35AC

3.3.6.1 With regard to Section 35AC of the Income Tax Act as stated in earlier paragraphs, a deduction on expenditure is allowed for eligible projects if it is recommended by the National Committee to the Ministry of Finance. It has been represented before the Commission that this is a time consuming process especially for organisations situated in far off areas which wish to avail this deduction. They have to spend considerable time, energy and resources to put up their case before the National Committee.

3.3.6.2 The Commission is of the view that exemptions sought under this provision of the law could be expedited if the National Committee is replaced by four Regional National Committees to be located in Delhi, Mumbai, Chennai and Kolkata. The members of these Committees would be persons of eminence in public life (as in the present National Committee) but perhaps with fewer members. Having Committees at regional levels would expedite quick disposal and also ensure that State biases do not occur while making recommendations. The recommendations of the Regional Committees would continue to be forwarded to the Ministry of Finance for a final decision. It is further suggested that the recommendations of the Committees should be valid for a period of five years (instead

of the present three years). Subsequent approval if required, would be granted only if the National Committee is satisfied about the activities of the association or institution during the preceding period of approval but here also the final decision would be that of the Ministry of Finance. The necessary administrative support to these Regional Committees would be provided by the Office of the Chief Commissioner of the city in which the Committee has its headquarters. A Commissioner of Income Tax could act as Secretary of the Committee.

3.3.7 Recommendations:

a) **Under Section 12AA and Section 80G, the registration or approval should be granted or an order rejecting the application should be passed within a period of ninety days from the date of filing of the application instead of the present one hundred and eighty days.**

b) **In view of the fact that infrastructure projects are a critical component of charitable institutions, the period for accumulation of surplus which is currently five years needs to be further enhanced.**

c) **The present National Committee may be replaced by four Regional Committees to recommend "deduction on expenditure" to the Union Government under Section 35AC of the Income Tax Act.**

3.4 Regulation of Foreign Contribution

3.4.1 Legal Framework

3.4.1.1 The Foreign Contribution (Regulation) Act, (FCRA) 1976 has the primary objective of regulating the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that Parliamentary and political associations, academic and other institutions as well as individuals working in important areas of national life may function in a manner consistent with the values of a sovereign democratic republic. The Act prohibits acceptance of foreign contribution by election candidates, journalists, public servants, members of the legislature, and political parties or their office bearers (Section 4), and allows Associations having definite cultural, economic, educational religious or social programme to accept such contributions after complying with certain requirements (Section 6).

3.4.1.2 The requirements are: (i) that the Association shall register itself with the Union Government in accordance with the Act; (ii) shall agree to receive such foreign

contribution only through a particular branch of a Bank as specified in the application for registration, and (iii) shall give an intimation to the Union Government as to the amount of each foreign contribution received, the source from which it was received, and the manner in which such foreign contributions was utilized. The Union Government may also require such Associations to obtain its prior permission before accepting any foreign contribution if it is satisfied that the acceptance of foreign contribution by such Association is likely to affect prejudicially the sovereignty and integrity of India or the public interest or free and fair elections to any legislature; or relation with foreign countries; or harmony between religious, racial, linguistic or regional groups, castes or communities (Section 10). Prior permission of the Union Government is also required for any organisation of political nature, not being a political party (Section 5) or for any Association not registered under FCRA [Section 6(1a)] for accepting any foreign contribution.

3.4.1.3 FCRA has a rigorous scheme for compelling the recipients of foreign contributions to adhere to the stated purpose for which such contribution has been obtained. It is mandatory to receive the fund only through an intimated branch of a Bank, to use the fund only through that intimated Bank branch, to file annual returns, to use the fund only for the Association's purpose and not to pay to political parties. Government has the power to inspect and seize accounts and records, audit associations that fail to furnish returns, and confiscate articles and currency received in contravention of the Act.

3.4.1.4 The clause (Section 10) under the existing FCR Act, 1976 that the Union Government may, under certain circumstances, require organisations to obtain its prior permission before accepting any foreign contribution gives a lot of subjective powers to the authorities. The process of inquiry involving verification by intelligence agencies leaves considerable scope for misuse of powers, delay and harassment.

3.4.1.5 The Union Government has introduced a new Bill called The Foreign Contribution (Regulation) Bill, 2006 on 18th December, 2006 in the Parliament. The proposed Bill seeks to replace the existing Foreign Contribution (Regulation) Act, 1976 to regulate the acceptance, utilisation and accounting of foreign contribution and acceptance of foreign hospitality by a person or an Association. As per the Statement of Objects, the significant development of the recent past such as – change in the internal scenario, increased influence of voluntary organisations, spread in use of communication and information technology, quantum jump in the amount of foreign contribution being received and large scale growth in the number of registered organisations have necessitated large scale changes in the existing Act.

3.4.1.5.1 The Foreign Contribution (Regulation) Bill, 2006 provides, inter alia, to -

(i) consolidate the law to regulate, acceptance and utilisation of foreign contribution or foreign hospitality and prohibit the same for any activities detrimental to the national interests;

(ii) prohibit organisations of political nature, not being political parties from receiving foreign contribution;

(iii) bring Associations engaged in production or broadcast of audio news or audio visual news or current affairs through any electronic mode under the purview of the Bill;

(iv) prohibit the use of foreign contribution for any speculative business;

(v) cap administrative expenses at fifty per cent of the receipt of foreign contribution;

(vi) exclude foreign funds received from relatives living abroad;

(vii) make provision for intimating grounds for refusal of registration or prior permission under the Bill;

(viii) provide arrangement for sharing of information on receipt of foreign remittances by the concerned agencies to strengthen monitoring;

(ix) make registration to be valid for five years with a provision for renewal thereof, and also to provide for cancellation or suspension of registration; and

(x) make provision for compounding of certain offences.

A critical comparison of the changes proposed in the existing legal framework by Foreign Contribution (Regulation) Bill, (FCRB) 2006 is given below:-

3.4.1.5.2 Salient features of the Foreign Contribution (Regulation) Bill, 2006 and the existing law (FCR Act 1976)

1. Purpose

(a) The preamble of the proposed Bill reads as –

"to consolidate the law to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or

companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto."

Whereas the preamble of the FCRA, 1976 reads as under:

"An Act to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic, and for matters connected therewith or incidental thereto."

(b) From a plain reading of the above, it is evident that the purpose of the FCR Bill, 2006 is prohibitive rather than regulatory. The expression "activities detrimental to the national interest" leaves scope for subjectivity.

2. Prohibition to Accept Foreign Contribution

(a) Section 4 of the FCRA, 1976 contains a list of the organisations and individuals that are prohibited from accepting foreign contribution. In the proposed Bill, few additions have been made such as – (i) organisation of a political nature not being a political party as specified by the Union Government; (ii) Association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of Sub-section (1) of Section 2 of the Information Technology Act, 2000 or any other mode of mass communication.

(b) The Bill however does not provide any guidelines or definition on the basis of which an organisation can be treated as "an organisation of a political nature not being a political party". The Union Government has been empowered to notify such organisations and a provision for representation before the Union Government has been made. Apprehensions have been expressed in some quarters that in the absence of any specified criteria for this purpose, those organisations which articulate the concerns of the under-privileged and marginalised may suffer.

3. Restrictions on Utilizing Foreign Contribution

(a) Under the proposed Bill, contributions shall be utilised only for the purpose for which the same have been received (provided that any foreign contribution or any income arising out of it shall not be used for speculative business). Also the receiver shall not defray, such sum not exceeding 50% of such contribution received in a financial year, to meet administrative expenses. The Union Government has been authorized to prescribe the element which shall be included in the administrative expenses. Such provisions were not there in the FCRA, 1976.

(b) The Bill does not define "speculative business". Incidentally the Income Tax Act, 1961 allows the voluntary sector to invest funds in the modes specified under Section 11(5) which include government securities and mutual funds. Trusts have also been allowed to invest through such modes under the Indian Trusts Act, 1882. Therefore, the term "speculative business" needs to be spelt out clearly.

(c) As regards the administrative expenses, the Bill gives considerable discretionary powers to the government. One may visualise situations where it would be difficult to differentiate between the administrative and project related expenses. For example, for an organisation engaged in health care projects salaries and other expenses on doctors/paramedics should be treated as a part of the core project cost and not as administrative expenses. This should be ensured by issuing clear guidelines rather than leaving it to the discretion of individual officials.

4. Definitions

Apart from the ambiguity in the concepts of "speculative business" and "administrative expenses" the definition of the following two terms needs reconsideration:

(i) Foreign Hospitality – "Foreign Hospitality" means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country or territory or with free boarding, lodging, transport or medical treatment. The term "purely casual" needs to be explained further.

(ii) Foreign Source – The definition of "Foreign Source" includes a company within the meaning of the Companies Act, 1956 in which (i) more

than 1/2 of the nominal value of its share capital is held either singly or in the aggregate by the citizens of a foreign country, (ii) corporations incorporated in a foreign country or (iii) a foreign company. The first of these criteria will cover many Indian multi-national companies including banks such as ICICI Bank and therefore, there may be need for reconsideration of this provision.

5. Registration

(a) Any organisation having a definite cultural, economic, educational, religious or social programme requires to be registered under the FCRA, 1976 and the proposed Bill before acceptance of any foreign contribution. In case, such organisations are not registered they will have to obtain prior permission from the Union Government for acceptance of any contribution.

(b) Going beyond the provisions of the present Act, the FCR Bill, 2006 gives immense discretion to the Government in the matter of registration. The Government can refuse to grant registration or permission to an organisation if it is satisfied that the organisation has indulged in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another.

(c) A necessary condition for securing registration/permission is that the applicant organisation should have undertaken meaningful activity in its chosen field or should have a meaningful project for the benefit of the people for whom the foreign contribution is proposed to be utilized. This again is a matter of subjective satisfaction and is open to misinterpretation.

(d) The certificate granted under the proposed Bill will be valid for a period of five years and thereafter it will have to be renewed. The application for renewal must be made within six months of the expiration of certificate. The renewal also carries a fee. However, the existing FCRA, 1976 provides for one time registration only. The proposed provisions are likely to result in increased cost, effort and possible harassment to voluntary organisations.

(e) No time limit has been prescribed in the proposed Bill for grant or refusal of a certificate of registration or its renewal or for prior permission required in certain cases. But, under the existing FCRA, 1976, a time limit of ninety days is prescribed for grant of prior permission, failing which the permission will be deemed to have been granted.

(f) Government has also been given powers with regard to suspension and cancellation of the registration certificate in the proposed Bill. The cancellation of the certificate can be ordered, if the holder has made an incorrect or false statement at the time of application, has violated any of the conditions of the certificate, the Government considers that the cancellation is necessary in the public interest and the holder of certificate has violated any of the provisions of this Act or Rules or Order made thereunder. Once the certificate has been cancelled, the person / organisation shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

6. Finance

The FCR Bill, 2006 allows receipt of foreign contribution in a single account only through one such branch of a Bank as may be specified in the application for grant of certificate. However, the recipient has been allowed to open one or more accounts in one or more Banks for utilizing the foreign contribution received by him. This is an improvement over the provisions of FCRA, 1976.

7. Appeal

The proposed Bill contains provisions for appeal before the High Court / Court of Sessions against the order on adjudication of confiscation. (Section 31). This section provides that any person aggrieved by any order made under Section 29 (adjudication of confiscation) may prefer an appeal. However, no appellate provisions are there over government's powers to restrict acceptance of foreign hospitality, to prohibit receipt of foreign contribution in certain cases (Section 9 of the Bill), to grant registration under Section 12(3) of the Bill, or to order suspension / cancellation / renewal of certificate etc.

8. Offences and Penalties

(a) The scope of punishable offences have been substantially enlarged to cover offences such as making of false statement, declaration of delivering false account, penalty for article or currency or security obtained in contravention of the provisions of the Bill etc. It is observed here that while prescribing the quantum of punishment, the element of mens-rea should be taken into account.

(b) The Bill however provides for compounding of offences punishable with imprisonment only.

3.4.1.5.3 The Bill has become a subject of intense debate and is being perceived as an intrusive piece of legislation which intends to place charities, receiving foreign donation under the subjective scrutiny of the authorities. The main arguments are:

- The aim of the Bill, as stated in the preamble is to prohibit the acceptance and use of foreign contribution for activities detrimental to 'national interest'. The term "detrimental to national interest" leaves scope for subjective interpretation.
- There are several grounds on which a certificate of registration could be refused. The words like likelihood of diversion of funds for 'undesirable' purposes or not having undertaken 'meaningful' activity or not having prepared a meaningful project for the 'benefit' of the people admit subjectivity.
- The provision for renewal every five years could lead to harassment.
- The Bill gives the executive, wide discretionary powers to cancel a certificate of registration in the 'public interest'. This is too broad, and open to subjective interpretation. Cancellation of the certificate should only be permitted upon breach of specific legal obligations.
- The powers of inspection, search and seizures may be tools for causing harassment to NPOs and puts them virtually in a position of subordination to the authorities.
- The provision for a cap of 50% on 'administrative expenses' is arbitrary and in many cases will stifle organisations working on projects which have high human resource content.
- The proposed Bill tries to place unnecessary restrictions on resources and investment of an organisation.
- The provision of the Bill prohibiting some categories of individuals from receiving foreign contributions goes against the principle of natural justice.

3.4.2 Reform of Registration Procedure

3.4.2.1 In the context of development of social capital, the primary concern with regard to receipt of foreign contributions should be to ensure that genuine organisations are not harassed or their functioning impeded by byzantine procedures and red tapism.

3.4.2.2 The Commission is of the view that the process of registration under the proposed law on foreign contribution needs to be kept simple and there is a need to fix a time limit for issue of registration certificate / prior approval by the competent authority.

3.4.2.3 At the same time, the Commission is aware that a large number of voluntary organisations are receiving donations from foreign sources and it is quite possible that at times the funds could be used for purposes which could adversely affect national interest. Against this background, creating an effective monitoring system to track such funds becomes necessary. The Commission is of the view that there is a need to maintain a fine balance between 'national interest' on one side and free functioning of the voluntary sector on the other. To that extent, there is need to clarify and amend the proposed Bill and clear the misgivings which are agitating the voluntary sector.

3.4.2.4 The changes required in the proposed Bill to provide such a balance are discussed below:

3.4.2.4.1 An organisation working on cultural, economic, educational or religious programmes which intends receiving foreign donation will need to be registered or required to seek prior approval under Section 11 of the FCR Bill, 2006. Even after registration, it is mandatory to furnish returns and details which enable competent authority to examine and check whether funds have been utilized in accordance with the provisions of this law.

3.4.2.4.2 The Bill prescribes no time limit for a procedure under Section 11. This is far more stringent than the provisions of the existing FCRA, 1976 which provided an outer time limit of ninety days. There is a deemed clause as well. Having such an open ended law may lead to delay and harassment. In a similar provision under the Income Tax Act (Section 12AA) too, which deals with registration of charitable institutions, there is a time limit of six months. There, it has been recommended that the period of six months should be further reduced to ninety days.

3.4.2.4.3 The existing Act FCRA, 1976 primarily intended to regulate receipt of foreign contribution in a manner such that the funds are not used (a) against the sovereign interest of the State, (b) for supporting political activities and elections and (c) for personal benefits of public servants. But, the FCR Bill, 2006 goes much beyond and tends (i) to prohibit receipt of foreign contribution by certain class of individuals or organisations; and (ii) to regulate foreign contribution received by voluntary organisations. It places extensive emphasis on national interest and issues such as not taking up meaningful activity [Section 12(3) (b)]; or not preparing a meaningful project [Section 12(3) (c)]; have been placed under the domain of the proposed law. The Commission feels that the term "national

interest" or other requirements as enunciated in the Bill, if not defined properly, could lead to a wide subjective interpretation and create unnecessary difficulties for bona fide voluntary organisations.

3.4.3 Rationalisation of Procedures

3.4.3.1 As per the Annual Report for the year 2005-06 of Ministry of Home Affairs, FCRA Division as on 31st March, 2006, 32,144 associations were registered under FCRA out of which 18,570 associations (including 6,827 associations which have filed nil return) received a total foreign contribution of Rs.7,877.57 crores. The Table given below shows that for the last five years, the majority of the Associations registered with the Ministry of Home Affairs have received contribution below Rs.1.0 crore.

Table 3.2: Year-wise details of Foreign Contribution received by Organisations (2001-05)

Year	Below Rs. 1 crore	Between Rs. 1-5 crores	Between Rs. 5-10 crores	Above Rs. 10 crores
2001-02	14,761	721	77	59
2002-03	15,650	798	76	66
2003-04	16,187	818	83	57
2004-05	17,373	985	112	70
2005-06	17,258	1,070	143	99

3.4.3.2 The procedure for grant of a registration certificate under the FCR Act is long and cumbersome and causes harassment to applicants. The division in charge of the subject in the Home Ministry is grossly understaffed and thus ill-equipped to deal with the large number of applications it receives every year. For verification of antecedents of the applicant organisations, it relies primarily on inputs provided by the intelligence agencies. For these agencies, this work is a low priority item and hence, the whole process takes a lot of time. Further, as per the intent of the Act, the Authorities have to ensure that the recipients of foreign contribution adhere to the stated purpose for which such contribution has been obtained. But in practice, this mechanism is very weak. Once the registration is granted, the matter goes into the sidelines. Scrutiny of the returns filed subsequently by organisations is reported to be perfunctory. As a result, the FCR Act is not meeting the objectives for which it was enacted.

3.4.3.3 Often, cases are selected by the FCRA Division of the Home Ministry for inter-agency consultation. In the absence of transparent rules / guidelines with regard to the procedure to be adopted for such consultations, the inter-agency reference leaves considerable scope for harassment, delay and corruption. The Commission is of the view that provisions of the Act need further elaboration with regard to (a) the minimum amount of donation which would require inter-agency consultation, (b) the level of the Authority which would authorize it, and (c) setting up time limits for such procedures.

3.4.3.4 Currently, the entire work under the FCRA is being handled by a Division of the Home Ministry headquartered at New Delhi. The State Government and its machinery particularly the District Administration which are in a position to observe and monitor the activities of the NGOs in their areas are not involved in the process. The Commission is of the view that if some of the functions under FCRA are decentralized and delegated to the State Government/ District Administration, it will help in (a) speedy disposal of registration petitions, (b) close monitoring of their activities, and (c) scrutiny of returns.

3.4.3.5 Moreover, many organisations are in receipt of meagre funds but they have to undergo full compliance requirements under the provisions of FCRA, 1976. This leads to delay and harassment besides putting a strain on the administrative capacity of those charged with the task of scrutinising their returns. The Commission feels that a threshold limit with regard to the amount of foreign contribution received in a year by voluntary organisation needs to be fixed. Organisations receiving contribution below this limit in a year would be exempted from registration and other provisions of this law. At the end of the year, these organisations could simply file an annual intimation with the appropriate authority indicating the details of the amount of foreign contribution received and utilized by them during the period. If the authority has reasons to believe that the declarant has suppressed or misstated certain facts with the deliberate intention of remaining within the threshold limit, activities of such an organisation can be probed further. Such a scheme is operative in other enforcement laws e.g. the provisions regarding Small Scale Industries under the Central Excise Act, 1944. In the background of the Table 3.2, such a threshold at present could be fixed at Rs.10.00 lakh. This figure could be revised from time to time. This step will enable the Authorities to concentrate on larger contributions.

3.4.4 Recommendations:

a) **The Foreign Contribution (Regulation) Bill, 2006 needs to be amended to include inter-alia the following suggestions:**

   i. **There should be a fine balance between the purpose of the legislation on one side and smooth functioning of the voluntary sector on**

the other. The objectives of such a regulatory legislation should be properly enunciated to avoid subjective interpretation of law and its possible misuse.

ii. There should be a time limit for procedures falling under Section 11 (seeking registration or prior permission for receiving foreign contribution).

iii. Transparent rules/guideliens should be prescribed for inter-agency consultation particularly in respect of (a) the minimum amount of donation which would require inter-agency consultation, (b) the level of the Authority which would authorise it, and (c) setting up time limits for such procedures.

iv. To facilitate (a) speedy disposal of registration / prior permission petitions received from organisations, (b) effective monitoring of their activities, and (c) proper scrutiny of returns filed by them, some of the functions under the Foreign Contribution (Regulation) Act should be decentralised and delegated to State Governments / District Administration.

v. Other concerns as stated in paragraph 3.4.1.5.3 also need to be considered.

b) Organisations receiving an annual foreign contribution equivalent to less than Rs.10.00 lakh in a year (the figure to be reviewed from time to time) should be exempted from registration and other reporting requirements of the law. They should be asked, instead, to file an annual return of the foreign contribution received by them and its utilisation at the end of the year. The law may provide that they may be liable to be investigated, if there is a reasonable suspicion of suppression / misrepresentation of facts, and penal provisions of the law will be used against them in case violation is established.